United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 20,42 1

Joseph W. Bell, III,
Appellant

v.

United States of America,
Appellee.

375

Appeal of The United States District Court
For The District of Columbia

Of Counsel:

FISHER, SHARLITT & GELBAND
1522 K Street, N. W.
Washington, D. C. 20036

JOEL H. FISHER
1522 K Street N. W.
Washington. D. C. 20036
Counsel for Appellant
(Appointed by this Court)

NEAL E. KRUCOFF
1522 K Street, N. W.
Washington, D. C. 20036
Associate Counsel for Appellant

POINTS ON APPEAL

I. Did the Trial Court err in not granting Appellant's motion for a re-instruction on the issue of self defense? (Tr. 243)

II. Did the Trial Court err in admitting testimony to the effect that by the Appellant hit the deceased with a stick while the deceased was enroute on foot to the Hospital? (Tr. 48)

III. Did the Trial Court err in permitting the prosecuting attorney to make misstatements in his closing argument concerning the alleged striking of the deceased by Appellant? (Tr. 180)

INDEX

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. THE TRIAL COURT ERRED IN REFUSING TO GRANT THE REQUEST OF APPELLANT TO RE-INSTRUCT THE JURY ON THE ISSUE OF SELF DEFENSE	9
II. THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE TESTIMONY THAT A FEW MINUTES SUBSEQUENT TO THE TERMINATION OF THE ALTERCATION BETWEEN APPELLANT AND DECEASED THE APPELLANT STRUCK DECEASED WITH A [redacted] STICK	14
III. THE MISSTATEMENT OF THE PROSECUTING ATTORNEY CONCERNING THE ALLEGED ASSAULT ON THE DECEASED WAS SO PREJUDICIAL, ABSENT AN ADMONITION BY THE COURT OR OTHER CORRECTIVE ACTION, THAT A REVERSAL IS REQUIRED	25
CONCLUSION	28

TABLE OF CITATIONS

Cases	Page
Bollenbach v. U.S., 326 U.S. 607	13
Bowman v. U.S., 50 App. D.C. 92, 267 Fed. 648 (1920)	15
Burge v. U.S., 26 App. D.C. 524 (1906)	15, 16, 17, 18, 19, 20, 21, 23
Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F. 2d 769 (1945)	15, 16, 17, 18, 20, 21
Corley v. U.S., ___ U.S. App. D.C. ____, 365 F. 2d 884 (1966)	6, 14, 20, 26, 27
Drew v. U.S., 118 U.S. App. D.C. 11, 331 F. 2d 85 (1964)	15
Grant v. U.S., 28 App. D.C. 169 (1906)	12
Harper v. U.S., 99/ U.S. App. D.C. 324, 239 F. 2d 945 (1956)	15, 16
Jackson v. U.S., 48 App. D.C. 272 (1919)	12
Kinard v. U.S., 68 App. D.C. 250, 96 F. 2d 522 (1938)	10, 11, 12
Nestlerode v. U.S., 74 App. D.C. 276, 122 F. 2d 56 (1941)	15, 16, 17, 21, 24
Swann v. U.S., 195 F. 2d 689 (4th Cir., 1952)	20
Williams v. U.S., 76 U.S. App. D.C. 299, 131 F. 2d 21 (1943)	13
Statutes and Regulations	
District of Columbia Code Sec. 21-545(b) (1966 Supp)	23
District of Columbia Code Sec. 22-2401	20
District of Columbia Code Sec. 22-2402	20
Federal Rules of Criminal Procedure, Rule 52(b)	12

TABLE OF CITATIONS (Continued)

Miscellaneous Citations

	Page
Stone, The Rule of Exclusion of Similar Fact Evidence; America 51 Harv. L. R. 988 (1938)	15
Warren on Homicide (1938)	20

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction entered on July 26, 1966, in the United States District Court for the District of Columbia in the case of United States of America versus Joseph W. Bell, III (Criminal Action No. 234-66). Jurisdiction of this court is founded upon 28 U.S.C. section 1291. The Appellant's application to proceed on appeal without prepayment of costs was filed on July 29, 1966 and granted by the District Court on August 11, 1966.

STATEMENT OF THE CASE

The Appellant, Joseph W. Bell, III, was indicted for first degree murder on March 7, 1966. Trial commenced on June 13, 1966 and ended on June 15th when the jury returned a verdict of murder in the second degree. Appellant was sentenced on July 26th to a term of from seven to twenty-one years.

The testimony at trial is summarized as follows:

Early Christmas morning, 1965, the Appellant, a young man of 20 years (Tr. 107) stabbed and killed (Tr. 28) Junius O. Truman during an altercation. The altercation and stabbing took place in a rooming house at 229 E Street, Northeast, in Washington at about 12:30 or 1:30 A.M. (Tr. 24, 34, 44, 45, 54, 55, 65, 66, 81, 82) at or near the main staircase in the house on the first floor (Tr. 33, 40)

There had been no prior difficulty or argument between the principals (Tr. 38, 61, 81, 112) both of whom were residents of the house (Tr. 31), the Appellant for the previous three months. (Tr. 84, 111) The Appellant testified that the trouble started when he discovered Truman in the act of taking the landlady's Christmas turkey from the refrigerator (Tr. 112) and that Truman, being somewhat intoxicated, (Tr. 29, 71, 109) attacked him with a screw driver. (Tr. 46, 109) No other witness knew how the trouble began (Tr. 41, 46, 61, 71), but the witnesses did agree, with one exception (Tr. 159), that Appellant went up the stairs to his room (Tr. 34, 67, 86, 94, 141) obtained a knife and returned to the fight. (Tr. 67, 109-110, 119) There was no agreement as to where the principals were

when the fatal blow was struck (Tr. 81, 121) nor on whether Truman had followed, or chased Appellant up the stairs.

The first government witness as to the altercation was Paul E. Hawes, a resident at 229 E Street, N.E. Hawes was in the Appellant's room on the second floor of the house with his wife (Mrs. Mary Ann Hawes), Linda Bell (the Appellant's wife) Gaither Ware and Wanda Sanders (who testified under the name of Tuwana Sanders) (Tr. 33-4, 38, 82) Hawes saw the Appellant come into the room and leave right away. (Tr. 34-5) He then heard a noise on the stairs (Tr. 41) and left the room to investigate. He discovered the Appellant and Truman fighting with weapons - the Appellant with a knife and Truman with a screw driver. (Tr. 35) Hawes helped separate the combatants and then left with Truman on foot with the intention of assisting him to Casualty Hospital, some five or six blocks away. (Tr. 36)

Bernard Sanders, a sixteen year old boy who also lived at the rooming house (Tr. 44) was also an eye witness to part of the altercation. He was in his bed on the first floor when he heard arguing. (Tr. 46) He heard the Appellant say that Truman had stabbed him with a screw driver when they were upstairs. (Tr. 46) The Appellant then went upstairs, came down again and a struggle started between the two combatants (Tr. 46). Young Sanders called Mr. Hawes who came out of the second floor room, went downstairs and broke up the fight. (Tr. 47) In the course of the fight, Truman was stabbed (Tr. 47) Sanders did not see Truman with a screw driver (Tr. 52)

Mary Ann Hawes, Paul Hawes' wife, and another of the party who were in the Appellant's room at the time of the homicide, first saw the fight between Truman and the Appellant when they were "wrestling" on the first floor of the house. (Tr. 55) She came out of the room when she heard someone call her husband, Paul Hawes (Tr. 55) The person calling is likely to have been Bernard Sanders whose testimony was discussed above.

Tuwana Sanders was in the Appellant's room when he came up the steps and got "something" out of a drawer and then left. (Tr. 67) She did not see any of the fight before the stabbing and did not testify as to whether Truman had followed Appellant up the stairs or had remained on the first floor (Tr. 677)

The first defense witness was Appellant's wife, Linda Louise Bell. She was also in the room with the others, but testified that she heard noise of fighting on the stairs before she saw the fighting on the first floor. (Tr. 84, 94, 95) She did not see her husband come into the room to get anything, although she appeared to alter this view somewhat on cross examination. (Tr. 94) She also stated that she saw the fatal blow struck by her husband just as Paul Hawes was breaking up the fight (Tr. 89) and that Truman had a screw driver. (Tr. 90)

The last defense witness, Gaither Ware, in contrast to the other witnesses testified that he saw the whole, or nearly the whole altercation. He stated that he saw Truman remove something from a drawer and attack the Appellant with it. (Tr. 142, 153-4). Ware

testified that he missed Appellant from the room where he and the others were congregated, went to look for him and therefore saw the beginning of the fight. (Tr. 152) He did not see the Appellant with a knife and stated, in contrast to Appellant, that the Appellant did not go up the stairs to get one. (Tr. 158-9)

The Appellant took the stand in his own defense (Tr. 106-134) and his testimony as to the origin of the trouble between himself and Truman has been described above. Appellant's principal contention was that he tried to escape from Truman by running up the stairs to his room but that Truman followed him in hot pursuit, stabbing at him with the screw driver. Appellant was therefore forced, under the circumstance, to reach into his room and get a knife to equalize his attacker. The pair, then tumbled down the stairs and the fight ended at the bottom of the stairs when Paul Hawes came down and separated them. The stabbing took place either on the stairs or on the first floor. (Tr. 109-110, 118-121)

Following the termination of the fight, Paul Hawes escourted Truman out of the house on foot with the intention of taking him to Casualty Hospital. (Tr. 36, 59) The Appellant and some others left shortly thereafter and caught up with Hawes and Truman at 6th and Aker Streets, N. E. (Tr. 37, 48)(about $3\frac{1}{2}$ blocks away and not exactly on a direct route to the Hospital) when Truman was heard to say "Don't start it up no more" and "Don't let him /Appellant/ bother me any more" or words to that effect. (Tr. 37, 59, 123, 133) One witness, Sanders said that Appellant struck Truman with a stick which may have been a support from the bannister of the rooming house. (Tr. 48 50,

75-6) The Appellant denied it (Tr. 123, 133) and other witnesses who were on the scene saw no such striking (Tr. 37) or were uncertain both as to the alleged striking and as to whether Appellant carried a stick. (Tr. 62-65) Exactly how Hawes and Truman got to the Hospital is not explained (Tr. 132), but Truman was pronounced dead on arrival there. (Tr. 25)

There was some dispute as to whether Truman had cut or struck Appellant with the screw driver as Appellant claimed he did. (Tr. 83, 90, 92, 110, 117, 124-128) The records of the Hospital were not conclusive (Tr. 135-139) nor was the testimony of the arresting officers relative thereto although the net effect of the testimony of the officers somewhat negated the Appellant's claim that he had been injured. (Tr. 73, 74, 169-70) The arrest took place at about 2:00 A.M. the same night in front of the rooming house. (Tr. 72)

SUMMARY OF ARGUMENT

I. The court erred in not re-instructing the jury on the question of self-defense although requested to do so by defense counsel at the close of the re-instruction on the elements of the offenses (which the jury had requested). (Tr. 230-243) This was error because self defense is an integral part of the question of malice. Malice is an element of first and second degree murder and its absence turns murder into manslaughter, or less. Self defense is an integral part of malice because fear of bodily harm (although not justified in the sense that would require an acquittal on such grounds) may have the effect of removing malice and thus reduce murder to manslaughter. The fact that the original charge contained an instruction on self defense did not cure the error. What the jury asked for was an instruction on the elements of the offense. What it got was an instruction which was incomplete as to malice and, in effect, removed from the jury's consideration the principal basis on which it could find lack of malice.

II. The Trial Court erred in admitting in evidence testimony that a few minutes after the fatal stabbing, while the deceased was enroute to the hospital on foot, Appellant struck the deceased with a stick. (Tr. 48) This evidence was used in support of the government's contention that the fatal blow was struck with malice. Logically evidence of subsequent crimes, in this case assault, should not be available to prove a previous state of mind. Even if there is no absolute prohibition on the admission of such evidence there is, as there should be, a very strict limitation on its admissibility because

of its doubtful value and obvious tendency to inflame the jury. The evidence in this case as to the alleged assault falls outside the exceptions to the general rule of exclusion of such evidence. The evidence was especially prejudicial to this defendant because it practically assured that the jury would find malice.

III. Not only should the evidence as to the alleged assault been excluded, but the prosecutor compounded the error by grossly misleading the jury in his closing remarks concerning the assault with an unsupported statement that Appellant had chased after the deceased in order to beat him. Although there was weak testimony that Appellant hit deceased with a stick, the evidence shows clearly that Appellant left scene of the house to find his friend Hawes and to determine if Hawes had been hurt while attempting to stop the fight. It was error for the Trial Court to allow such a statement to stand uncorrected by an admonition to the jury or in not declaring a mistrial. Corley v. U.S., _____ U.S. App. D. C. _____, 365 F. 2d 884 (1966).

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO GRANT THE REQUEST OF APPELLANT TO RE-INSTRUCT THE JURY ON THE ISSUE OF SELF DEFENSE

The charge to the jury was completed late in the afternoon of June 14th and the jurors were allowed to retire for the night before beginning deliberations the following morning. (Tr. 226) At about two o'clock the following afternoon (the 15th) the jury sent the following note to the court: (Tr. 230)

> "Please re-instruct the jury on the salient points which must be present for a verdict to be (1) first degree murder, (2) second degree murder, (3) manslaughter, (4) assault with a dangerous weapon. Particular attention should be directed to the charge of premeditation and deliberated (sic) malice in connection with first degree murder."

Counsel for the Appellant objected to any re-instruction, but the court overruled the objection and gave the instruction in substantially the same language as it had originally on the various possible offenses. (Tr. 231-243, 210-222)

At the completion of the re-instruction the court inquired of counsel if "...you have anything you wish to add." Counsel for the Appellant requested further instruction on "the self-defense angle". This was refused by the court on the grounds that the jury had not requested such an instruction. (Tr. 243) Appellant cites the refusal to re-instruct on self defense as reversible error.

The denial of Appellant's request for re-instruction on self-defense was error because it is simply impossible to divorce, on the one hand, the concept of the mental condition of a defendant relative to a charge of murder in the first degree and the lesser

> "Heat of passion [such that there is no malice] may be produced by fear as well as by rage...and, if the provocation therefore is adequate...the resulting killing may be manslaughter." 1/

The Court, both in its initial charge (Tr. 219) and in the re-instruction (Tr. 240) correctly informed the jury that the heat of passion necessary to reduce a homicide to manslaughter may be produced by fear. It also instructed the jury, in very general terms, on what constitutes a sufficient provocation.

The Court did not, however, either in the original charge or upon re-instruction, inform the jury as to the relationship between self-defense and malice. The ommission in the original charge (to which there was no objection) was alleviated if not cured, by the giving of the standard instruction on self defense (Tr. 221-224). At that point the jury could at least have understood that the provocation and fear as related to malice are very closely connected to the provocation and fear as related to self-defense especially since the latter instruction followed so closely on the manslaughter instructions (separated only by a paragraph on assault with a dangerous weapon at Tr. 221).

This was not the case on re-instruction. Then, despite the request of defense counsel, the Court declined to re-instruct on self defense even though this was obviously the only substantial

---

1/ Kinard was re-tried and was again convicted of murder in the first degree. This court affirmed. Kinard v. U.S. 69 App. D.C. 322, 101 F. 2d 246 (1938)

defense raised at trial and, more important, it bore directly on the question of malice- the very issue in which the jury was most interested.

What was really needed to tie together the self-defense and malice questions by way of instructions is found in Jackson v. U.S., 48 App. D.C. 272 (1919) and Grant v. U.S., 28 App. D.C. 169 (1906). In both these cases the trial court wisely went into some factual detail to show how fear of one's life or of bodily harm could effect malice and reduce murder to manslaughter. (48 App. D.C. at 279 and 28 App. D.C. at 176).[2/] This is what should have been done in this case when the original charge was given and on re-instruction.

The ommission, from the original charge of instructions on the relationship between self-defense and malice may not be reversible error under Rule 52(b), F.R. Crim. P. However, Rule 52(b) does not apply where there is a request for an instruction which is refused.

The fact is that by not re-instructing on self defense the Court gave an incomplete and misleading instruction on the question of malice, even though the jury requested instruction on the elements (especially malice) of the possible offenses of which it could find Appellant guilty and even though a self defense instruction was requested by the defense. This was error. The error is compounded by

---

2/ It is not perfectly clear from these two cases and from Kinard v. U.S., supra whether the provocation which causes the fear will be considered sufficient if there has been no wounding or striking of defendant by the deceased, but in this case it is not seriously disputed that both parties had weapons and that they were fighting before the fatal blow was struck (Tr. 35, 55).

the fact that the re-instruction was the last word heard from the Court by the jury and that it came about 24 hours after the close of the original charge. Only by a new trial can the Appellant be assured of proper and fair consideration of his only substantial defense. Bollenbach v. U.S., 326 U.S. 607; Williams v. U.S., 76 U.S. App. D.C. 299, 131 F. 2d 21 (1943).

II. THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE TESTIMONY THAT A FEW MINUTES SUBSEQUENT TO THE TERMINATION OF THE ALTERCATION BETWEEN APPELLANT AND DECEASED THE APPELLANT STRUCK DECEASED WITH A STICK

One witness for the government, a sixteen year old boy named Bernard Sanders (Tr. 44) testified that after the stabbing and after Sanders and the injured victim had left on foot for the hospital, the Appellant came up to them at 6th and Acker Streets, N. E. (about 3 blocks from the original scene) and hit the deceased with a stick. (Tr. 48) The blow was admittedly not the cause of death (Tr. 22, 28).

Two other witnesses at 6th and Acker Streets could not or did not corroborate this testimony (Tr. 37, 59-60) and the defendant denied it. (Tr. 123) In referring to Sanders' testimony in his closing argument the prosecutor stated (at Tr. 180):

> "One of the other witnesses went so far as to say not only was he [the appellant] there [at 6th and Acker Streets] but he struck the deceased again with Government's Exhibit No. 1. Yes, he struck him again, ladies and gentlemen."
>
> If it isn't premeditation then have you ever had a better case of a mind bent on mischief, a mind fatally bent on mischief, if it isn't first degree? The reason I emphasize that, if you have any doubt as to whether it is first degree, when you get your definition of a second degree murder ladies and gentlemen, you would say if they have not made first you certainly couldn't miss second, because here was a man chasing him two or three blocks trying to beat him..." 3/

3/ This was a grossly inaccurate description of the evidence and constitutes grounds for reversal in itself as the authority of Corley v. U.S., US App. D.C. 365 F. 2d 884 (1966).

Obviously the prosecutor was hoping that the jury would consider this evidence relevant to the issue of malice as to first or second degree murder,[4] and, apparently, it did. The Appellant vigorously asserts that the striking of the deceased by Appellent, if indeed it took place, about three blocks and some minutes after the fatal blow had been struck was not relevant to malice (the only issue to which that testimony was directed) and that its admission (or the failure to instruct the jury to disregard it) was clear and substantial error.

Whether evidence of another subsequent (or prior) crime, in this case assault, may be admitted against an accused in a criminal case has concerned the courts[5] and writers of scholarly treatises.[6] The courts are confronted with attempting to reconcile two conflicting principals: (1) that in order to preserve the presumption of innocence, the accused is to be tried only for the offense charged and may not be convicted of that offense because he may have committed some other offense and (2) that all relevant facts must be adduced so that the guilty may not go unpunished.[7]

4/ I.e., that Appellant had killed Truman with "deliberate and premeditated malice," D.C. Code Sec. 22-2401 (Murder in the first degree) or "with malice aforethought," D.C. Code Sec. 22-2402 (Murder in the second degree).

5/ E.g., Nestlerode v. US., 74 App. D.C. 276, 122 F. 2d 276 (1941); Drew v. U.S. 118 U.S. App. D.C. 11, 331, F. 2d 85 (1964); Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F. 2d 769 (1945); Burge v. U.S., 26 App. D.C. 524 (1906); Bowman v. U.S., 50 App. D.C. 92, 267 Fed. 648 (1920); Harper v. U.S., 99 U.S. App. D.C. 324, 239 F. 2d 945 (1956).

6/ E.g. Stone, The Rule of Exclusion of Similar Fact Evidence: 51 Harv. L.R. 988 (1938).

7/ Stone, ibid., 1033-4

II. THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE TESTIMONY THAT A FEW MINUTES SUBSEQUENT TO THE TERMINATION OF THE ALTERCATION BETWEEN APPELLANT AND DECEASED THE APPELLANT STRUCK DECEASED WITH A STICK

One witness for the government, a sixteen year old boy named Bernard Sanders (Tr. 44) testified that after the stabbing and after Sanders and the injured victim had left on foot for the hospital, the Appellant came up to them at 6th and Acker Streets, N. E. (about 3 blocks from the original scene) and hit the deceased with a stick. (Tr. 48) The blow was admittedly not the cause of death (Tr. 22, 28).

Two other witnesses at 6th and Acker Streets could not or did not corroborate this testimony (Tr. 37, 59-60) and the defendant denied it. (Tr. 123) In referring to Sanders' testimony in his closing argument the prosecutor stated (at Tr. 180):

> "One of the other witnesses went so far as to say not only was he /the appellant/ there /at 6th and Acker Streets/ but he struck the deceased again with Government's Exhibit No. 1. Yes, he struck him again, ladies and gentlemen."
>
> If it isn't premeditation then have you ever had a better case of a mind bent on mischief, a mind fatally bent on mischief, if it isn't first degree? The reason I emphasize that, if you have any doubt as to whether it is first degree, when you get your definition of a second degree murder ladies and gentlemen, you would say if they have not made first you certainly couldn't miss second, because here was a man chasing him two or three blocks trying to beat him..." 3/

3/ This was a grossly inaccurate description of the evidence and constitutes grounds for reversal in itself as the authority of Corley v. U.S., US App. D.C. 365 F. 2d 884 (1966).

Obviously the prosecutor was hoping that the jury would consider this evidence relevant to the issue of malice as to first or second degree murder,[4] and, apparently, it did. The Appellant vigorously asserts that the striking of the deceased by Appellent, if indeed it took place, about three blocks and some minutes after the fatal blow had been struck was not relevant to malice (the only issue to which that testimony was directed) and that its admission (or the failure to instruct the jury to disregard it) was clear and substantial error.

Whether evidence of another subsequent (or prior) crime, in this case assault, may be admitted against an accused in a criminal case has concerned the courts[5] and writers of scholarly treatises.[6] The courts are confronted with attempting to reconcile two conflicting principals: (1) that in order to preserve the presumption of innocence, the accused is to be tried only for the offense charged and may not be convicted of that offense because he may have committed some other offense and (2) that all relevant facts must be adduced so that the guilty may not go unpunished.[7]

4/ I.e., that Appellant had killed Truman with "deliberate and premeditated malice," D.C. Code Sec. 22-2401 (Murder in the first degree) or "with malice aforethought," D.C. Code Sec. 22-2402 (Murder in the second degree).

5/ E.g., Nestlerode v. US., 74 App. D.C. 276, 122 F. 2d 276 (1941); Drew v. U.S. 118 U.S. App. D.C. 11, 331, F. 2d 85 (1964); Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F. 2d 769 (1945); Burge v. U.S., 26 App. D.C. 524 (1906); Bowman v. U.S., 50 App. D.C. 92, 267 Fed. 648 (1920); Harper v. U.S., 99 U.S. App. D.C. 324, 239 F. 2d 945 (1956).

6/ E.g. Stone, The Rule of Exclusion of Similar Fact Evidence: 51 Harv. L.R. 988 (1938).

7/ Stone, ibid., 1033-4

The considerations to be taken into account by the court are succincly stated in the majority opinion of this court, per Bazelon, J., in Harper v. US., 99 U.S. App. D.C. 324, 239 F. 2d 945 (1956):

> "...[T]he rule is that evidence of other offenses is admissible when substantially relevant to the offense charged; inadmissible when its relevance is insignificant; and, in borderline cases, admissible when its relevance outweighs the undue prejudice that may flow from it, but otherwise inadmissible." (99 U.S. App. D.C. at 325)

Thus the rule is basically one of exclusion unless the commission of the other crime is relevant to some aspect of the case and its value is not overweighed by any inflamatory tendancy. The evidence of the assault by the Appellant on the deceased does not meet this test.

In the instant case it is clear, as was pointed out above, that the only function of the evidence as to the alleged assault, if it had any function at all, was to establish that the Appellant acted with malice when he killed Truman. Thus if it was not relevant to malice at the time of the killing it did not belong in the case.

Although there are a number of District of Columbia cases dealing with the question of the relevance of subsequent offenses, three seem closest to the facts in question. They are Burge v. U.S., 26 App. D.C. 524 (1906); Nestlerode v. U.S., 74 App. D.C. 276, 122 F. 2d 56 (1941); and Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F. 2d 769 (1945).

In Burge the defendant was convicted of murdering his wife by shooting. At trial, testimony was introduced that the defendant returned to his home after the shooting then left for the home of his wife's mother and on arriving there, about one half hour after the first

shooting, shot and wounded her. The defendant was arrested at the latter home and told the arresting officer that the mother had objected to his seeing her daughter and had once used a flatiron on him. The Court reversed the conviction on the grounds that the evidence was relevant neither to intent (malice) or motive, 26 App. D.C. at 536-7 or to show a scheme (i.e., to kill two people), 26 App. D.C. at 537-8. With regard to intent, the court conceded that crimes occurring prior to the offense charged might have some relevance but that later crimes must be much more carefully screened.

In Copeland supra, (another first degree murder case) this Court approved the admission of evidence that defendant had shot the victim and then pursued the victim's mother to the nearest street corner and shot her. Burge was distinguished because "In that case, in which we ruled out evidence of a second shooting, we thought there was no genuine issue with regard to the intentional character of the first and principal shooting. There was such an issue here." (80 U.S. App. D.C. 309)

Finally, in Nestlerode supra, the Court, in affirming the convictions, approved an instruction which highlights the issues in this case very well. Nestlerode was charged with two counts of murder in the first degree. The homicides arose out of a wild and reckless four mile drive by the drunken defendant in his automobile which started at about 12th and H Streets, N.E. and ended at Connecticut Avenue and Q Street, N.W. Both vicitims were pedestrians. One was struck and killed at 12th and H Streets, N.E. and the other at 9th and M Streets, N.W. Nestlerode was convicted of manslaughter as to the first victim and

second degree murder as to the second. Almost all of the evidence as to the recklessness and wantonness of the defendant in driving his car pertained to the period following the striking of the first victim.

At trial, after his motion for severance of the two charges was denied, defendant offered a prayer that the court instruct the jury that when considering the first count (the count pertaining to the first victim) they should disregard all evidence following the first striking and in considering the second count to disregard the evidence as to the first count. The Trial Court granted the first part of the prayer and denied the second. Defendant raised this denial on appeal and this Court affirmed. In affirming, however, the Court made the highly significant observation, per Groner, C.J. at 74 App. D.C. 278 the trial Court was correct in excluding from consideration by the jury all events following the first striking even though the two homicides were clearly part of the same continuous event. The Court went on to sustain the verdict of second degree murder by pointing to the events following the first striking as proof of malice (74 App. D.C. at 279).

Before discussing these cases in relation to the instant case it is important to examine more closely the comments of the Court in Copeland v. U.S., supra on the Burge case. In Appellant's view, the Copeland Court misread Burge and had it not done so the result in Copeland might have been otherwise.

The comments in Copeland on Burge are found at 80 U.S. App. D.C. 309 and 152 F. 2d 770 and are quoted above. What lead to that comment was the following language in Burge found at 26 App. D.C. 537.

> The exception to the rule which permits proof of another crime in order to exclude the defense of mistake or accident in the perpetration of the crime for which the defendant is on trial could not apply to this case. That the appellant most brutally shot and killed the deceased was proved clearly by all of the three eye-witnesses. There could be no pretense of mistake, and the jury could not possibly believe the unsupported pretext of the appellant that with his revolver he twice accidentally shot his wife. Upon this exception the rule the government would not be justified in assuming the risk of greatly prejudicing the jury in considering the degree of murder under the indictment.

But the real basis of the Court's decision in Burge is found at 20 App. D.C. 541 where the Court said:

> "In the case before us there is substantially no proof, nor is there such obvious relation between the two crimes that it may be clearly inferred that the one in any way characterized the other. Upon no theory can the relevancy of the testimony concerning the assault on /The mother/ be sustained without breaking down firmly established rules of evidence.

There is nothing inconsistent between the two passages just quoted. They refer separately to the two bases for admission of such evidence discussed above, i.e. that the evidence be relevant to some specific element of the case (such as motive, intent, scheme, identification, etc.) and that the evidentary value is not overweighed by the possibility of prejudicing the jury. Properly read then Burge v. U.S., supra, holds that the evidence introduced in that case as to the second shooting was not relevant to any of the issue it might have been used to prove and, in any case, with respect to motive (whether the shooting was accidental or purposeful) its value was almost nil because the defendant's story of accidental discharge of the revolver was simply incredible.

The court in Copeland v. U.S., supra, in considering the admission of the second shooting in the trial of that case apparently failed to make that distinction. It thereby approved the admission of evidence that this Court in Burge declared irrevelant on any theory. It should not have reached the question of how much value the evidence of the second shooting had to the issue of "intent" (80 U.S. App. D.C. at 308) until it decided, based on the decided cases, that the evidence was even relevant.

The Appellant asserts that the tenuous testimony of his striking the deceased was neither relevant to the issue of malice nor, was its evidentiary value such that it could have been properly admitted despite its obvious inflammatory effect.

At first blush the use of any subsequent evidence, especially subsequent crimes, would seem to be totally irrelevant to the issue of a defendant's mental state at the time of or immediately prior to the commission of the crime. After all, the malice needed to convict for murder in the first degree is premeditated, D.C. Code Sec. 24-2401, and for second degree aforethought, D.C. Code Sec. 24-2402. However, there are cases in which Courts of Appeal have approved such evidence, e.g., Copeland v. U.S., supra and Swann v. U.S., 195 F. 2d 689 (4th Cir., 1952) and there does not appear to be a universal prohibition on such evidence in the texts, e.g. 3 Warren Homicide Sec. 273.

Appellant submits that a proper consideration of the demands of justice and the preservation of the presumption of innocence so important to our system of jurisprudence requires a re-evaluation of any

rule that permits any evidence of a later crime, especially where the jury's determination of the issue of malice (an issue on which inflammatory evidence can have considerable effect) may mean, as it might have in this case, the difference between life and death for the accused. The strong language in Burge, supra indicates that such was the attitude of this court in 1906 and no changes in our life and times since then would seem to necessitate any alteration of that view.

The apparent lack of a universal ban on admission of subsequent crimes makes the problem more difficult in each case. There is obviously, a logical inconsistancy in relating back events to establish a previous mental attitude and, because there is no absolute ban, the problem must be delt with in some sort of rational fashion in each case consistent insofar as possible, with other cases.

In the case at bar the only result can be to rule the evidence out. The "crime" introduced against Appellant (the alleged assault) is, in the first place, considerably less grevious than attempted murder, as in Copeland and Burge, supra or murder in the second degree, as in Nestlerode supra. In time and distance it (the alleged assault) is further away from the offense charged than the second offense in Copeland but closer than Burge and Nestlerode.

In Nestlerode and Copeland, however there was testimony covering every movement of the defendant between the first and second crimes and, more important, there was evidence of a design beginning before the first crime and continuing until the second. In contrast in this case, there was no testimony that there was bad blood between Appellant and the deceased (e.g., Tr. 61, 111-2) or that he had

purposely gotten himself drunk nor was there evidence as to what, if anything, happened to Appellant enroute to 6th and Acker Streets.

If the jury could not decide the issue of malice on the basis of what took place in the house then nothing that happened later, save a confession, could help them. Even an attempt at stabbing the dying victim at 6th and Acker would have already been too remote to show malice because, as we have just postulated, the only evidence of the source of the malice, the altercation in the house, did not support a finding of malice and malice at 6th and Acker Streets is not malice a few minutes earlier at 229 E Street.

But if the alleged assault is deemed relevant it is, at best, cumulative and confusing and, because of its inflammatory nature, not proper evidence. The only defense raised by the Appellant was self defense. If the jury decided, under the circumstances, that the Appellant was not legally justified in stabbing the deceased in self defense it was then free to select which of the several possible verdicts best fit the case. In deciding that complex question it again had to revisit the facts. Was the attack by Truman sufficient provacation create the frame of mind (heat of passion) necessary to reduce murder to manslaughter? If not, Appellant is guilty of either first or second degree murder and the issue of malice is decided. If so, then the question is did he have such a frame of mind. But there is nothing that one can learn from the facts which took place after the stabbing that is of any aid to the jury. In fact, there is no evidence as to how many blows were struck, if any, by either party after the stabbing. From the facts it is just as likely that something

that happened after the stabbing (rather than before) created the frame of mind in Appellant which caused him to strike the deceased with a stick. The deceased may have struck Appellant several times after the stabbing (e.g., Tr. 35) or he may have thought that the deceased had stabbed his friend Paul Hawes with the screwdriver (Tr. 37, 123-4). Thus if the jury could not find malice in the Appellant's mind from the facts available to it as to the events prior to the stabbing, nothing that happened thereafter could possibly aid it and the introduction of the alleged assault adds nothing but prejudice.

The introduction of the alleged assault could have had no other effect than to tend to pursuade the jury that Appellant was a dangerous man who ought to be locked up for his own good and that of society's. This may be a consideration relevant to a sanity hearing, D.C. Code Sec. 21-545(b) (1966 Supp.), but not in a criminal case in which the defendant is entitled to the sanctity of the presumption of innocence. Without such protection, defendants, as this Court pointed out in Burge v. U.S. supra, will be crushed with irrelevant matter which they are not prepared to meet.

Without evidence of this alleged assault it is at least questionable and probably doubtful that Appellant would have been convicted of murder in the second degree. The most crucial question in the case was whether the deceased followed the Appellant up the stairs in hot pursuit or whether Appellant went up alone and elected to come down and renew the fight with the newly acquired knife. The issue was hotly contested (Tr. 34-5, 46, 67, 84, 94, 95, 158-9). If the jury accepted the former theory or, as is likely, could not resolve it, an acquital,

or at worst a manslaughter conviction, seems the obvious result. If it accepted the latter theory (i.e., that Appellant broke away from Truman, retreated to his room and then returned to the fight) then certainly the self defense theory of Appellant would be rejected and Appellant's contention that he acted without malice put in serious, but not necessarily fatal, jeopardy.

But with the addition of the alleged assault, the outcome is hardly in doubt. That such evidence could make such a difference is amply demonstrated by the result in Nestlerode v. U.S., supra, where the jury could not find evidence to convict of murder (in either degree) as to the first count without the evidence as to the subsequent events - events which clearly supported a murder conviction as to the second count.

No conviction of the serious crime of which Appellant stands convicted should be based, as this one is, on irrelevant and inflammatory evidence bearing on the sole issue as to which there was serious dispute at trial.

III. THE MISSTATEMENT OF THE PROSECUTING ATTORNEY CONCERNING THE ALLEGED ASSAULT ON THE DECEASED WAS SO PREJUDICIAL, ABSENT AN ADMONITION BY THE COURT OR OTHER CORRECTIVE ACTION, THAT A REVERSAL IS REQUIRED

The Appellant cites as additional grounds for reversal the failure of the Trial Court to admonish the jury, or declare a mistrial, with respect to the remarks made by the prosecutor relative to the alleged assault by the Appellant on the deceased at 6th and Acker Streets, N.E.[8] The significant words are "There was a man [referring to Appellant] chasing him [the deceased] two or three blocks trying to beat him." (Tr. 181)

The discussion of this feature of the case need not be lengthy. The record speaks for itself.

Despite the vigorous assertions of the prosecutor to the contrary there was no evidence that Appellant chased the deceased nor that he was trying to beat him.

The defendant and witnesses stated that he left the house to find his young friend, Paul Hawes, after learning that Hawes might have been hurt. (Tr. 123, 144) Hawes, a Government witness, verified that Appellant in fact inquired of him at 6th and Acker Streets as to any injury he had sustained. (Tr. 37) Both Hawes and his wife testified that Hawes did indeed have blood on his shirt. (Tr. 42-3, 57) Only Bernard Sanders, a lad of 16 (Tr. 44) stated that the Appellant hit the deceased with a stick (Tr. 48), but no witness described Appellant

8/ Quoted in full at page 5 of this brief.

as chasing after the deceased - with the intent • to hit the deceased or with any other intent and Paul Hawes who accompanied Truman all the way to the Hospital saw no striking. (Tr. 37) The only witness who testified that Appellant had a stick in his hand before arriving at 6th and Acker Streets was Mary Ann Hawes but her tale was so garbled that a literal reading of her testimony leaves the impression that she thought she saw Appellant with a stick, when she was a block behind him, as he was heading toward 6th and Acker Streets, but that by the time Appellant arrived at 6th and Acker he no longer had it. (Tr. 62-64)

The misstatement of the prosecutor at 6th and Acker added considerable color to the weak testimony that Appellant struck the deceased with a stick. He thus converted a single blow struck a few blocks and some minutes, after the fatal wounding into scenario in which Appellant stabbed the deceased and, after having been pulled away from him and losing his knife, then tried to continue the fight by pursuing the dying man down the street so as to beat him further. There was simply no basis for such a statement in the record.

The importance of the "assault" testimony has been discussed elsewhere in this brief. Without the grossly erroneous remarks of counsel for the Government the jury might have disregarded the evidence as too weak. But with it, the jury was left with a highly colored (almost fanciful) and inaccurate impression. Corley v. U.S., ____ U.S. App. D.C. ____, 365 F. 2d 884 (1966).

In Corley this Court reversed because of the Trial Court's failure to correct a serious misstatement by the prosecutor on a crucial issue even though not specifically objected to and, as the dissent pointed out, defense counsel in his closing statement "...more than neutralized the government's mistake..." (365 F. 2d at 887).

In the instant case, the only issue left undecided, once an acquital on self defense had been ruled out[9/] was malice. Nothing said later by defense counsel in his closing statement cured the error, and as in Corley, the evidence on the crucial issue to which the statement was directed was sharply conflicting, i.e., evidence relative to Appellant's frame of mind at the time of the stabbing and evidence as to the alleged assault. Under the circumstances substantial prejudice was probable.

9/ As it ultimately was.

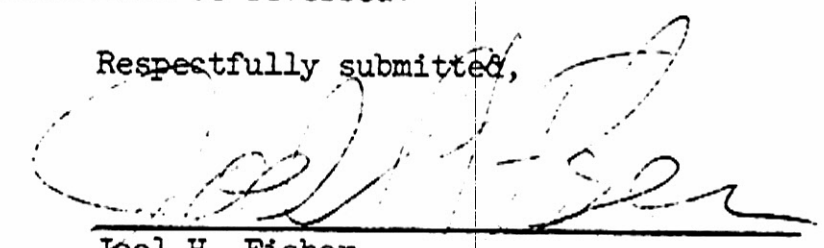
CONCLUSION

The errors committed by the Trial Court in this case are not isolated points. They all bear on the issue of malice as related to first and second degree murder and their effect was cumulative. Chronologically, the Court first admitted highly prejudicial and irrelevant testimony (the alleged assault at 6th and Acker Streets) which was introduced only to reflect on the question of malice. Then, in reference to the alleged assault, the prosecutor, in his closing argument, completely mislead and inflamed the jury by "describing" to them events which never occurred but which were calculated to, and undoubtedly did in fact, make the jury believe (even more than if the testimony concerning the assault had been correctly described) that Appellant acted, at the time of the fatal stabbing, with evil intent. Finally, the Court, refused to re-instruct the jury on the question of self defense even though self defense is an intregal part of the issue of malice and thus tended to remove the only substantial counter to the evidence as to malice from consideration by the jury.

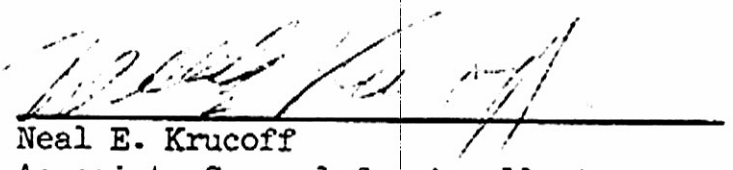
The cumulative effect is obvious. Under the circumstances it is as certain as can be that the jury could not find the Appellant free from malice, although without the errors discussed in this brief, the result could very well have been otherwise.

For the reasons stated it is respectfully urged that the judgment of conviction appealled from be reversed.

Respectfully submitted,



Joel H. Fisher
Counsel for Appellant
(Appointed by this Court)
1522 K Street, N. W.
Washington, D. C.



Neal E. Krucoff
Associate Counsel for Appellant
1522 K Street, N. W.
Washington, D. C.

Of Counsel:

FISHER, SHARLITT & GELBAND

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

For The District Of Columbia

No. 20,421

Joseph W. Bell, III

Appellant

v.

United States of America,

Appellee

Appeal of The United States District Court
For The District of Columbia

JOEL H. FISHER and
NEAL E. KRUCOFF
1522 K Street, N.W.
Washington, D.C. 20036
Counsel for Appellant
(Appointed by this Court)

Of Counsel:

FISHER, SHARLITT & GELBAND
1522 K Street, N.W.
Washington, D.C. 20036

INDEX

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	
I. THE REFUSAL OF THE TRIAL COURT TO RE-INSTRUCT ON SELF-DEFENSE	3
II. THE EVENTS AT SIXTH AND ACKER STREETS	8
III. THE CLOSING REMARKS OF GOVERNMENT COUNSEL	11
CONCLUSION	12

TABLE OF CITATIONS

Cases	Page
Bollenbach v. U.S., 326 U.S. 607	6
Burge v. U.S., 26 App. D.C. 524(1906)	9
Copeland v. U.S., 80 U.S.App. D.C. 308, 152 F.2d 769(1945)	9
Corley v. U.S., ____ U.S. App. D.C. ___, 365 F. 2d 884(1966)	2, 9, 11
Cross v. U.S. 122 U.S. App. D.C. 283, 353 F.2d 454(1965)	2, 11
Fairbanks v. U.S., 96 U.S. App. D.C. 345, 226 F.2d 251(1955)	8
Harper v. U.S., 99 U.S. App. D.C. 324, 239 F. 2d 945 (1956)	8, 9
Notaro v. U.S., 363 F.2d, 169(9th Cir.1966)	4, 5, 6
Tatum v. U.S. 88 U.S. App. D.C. 286, 190 F.2d 612(1951)	10
Statutes and Regulations	
Federal Rules of Criminal Procedure, Rule 52(b)	10

SUMMARY OF ARGUMENT

I. Instructing the jury on self-defense was necessary, not only because Appellant had raised this defense at trial, but also because, as Appellee concedes, self-defense and malice were closely interrelated. When the Court reinstructed on malice but declined to include the instructions on self-defense, it substantially removed from consideration by the jury the possibility of a conviction of the lesser included offense of manslaughter because the principal theory on which Appellant was relying to show lack of malice was that he acted in defense of his person. Appellee has incorrectly characterized portions of the Appellant's brief with respect to the inclusion of "fear" in the instruction and reinstruction and with regard to the need for a factual description of the elements of self-defense by the Court.

II. Appellee does not come to grips with the principal difficulty in the admission of the testimony concerning the events at 6th and Acker Streets. Since some of that testimony indicated that Appellant was guilty of another crime (assault or assault with a dangerous weapon) which was not charged in the indictment, the law of this, and every other jurisdiction requires that extra care be taken in admitting such testimony lest the accused be unduly prejudiced thereby. No such precautions were taken in this case at trial and the result was substantial prejudice.

III. The case of Cross v. U.S. 122 U.S. App. D.C. 283, 353 F.2d 454(1965) is not on point. The misstatement by the Prosecutor in the instant case was no less serious than that in Corley v. U.S., U.S. App. D.C. 365 F.2d 884(1966).

ARGUMENT

I. THE REFUSAL OF THE TRIAL COURT TO RE-INSTRUCT ON SELF-DEFENSE

The Appellee has misread Appellant's brief in connection with the refusal of the trial court to re-instruct on self-defense. As to the major point made by Appellant, Appellee most generously concedes, at page 13 of its brief, that Appellant's argument contains a "kernel of validity", but Appellee does not meet the argument.[1/] The central issue is whether the omission of a re-instruction on self-defense, although requested, left the jury with a misconception on the issue in which the jury was most interested -- malice.

Appellee acknowledges that fear may remove malice (Appellee's brief, pages 11, 13 and 14) and that "... it was necessary and appropriate in the present case for the jury to be instructed both as to self-defense and malice..." (Appellee's brief, page 14) for that reason. Was it error to omit self-defense when re-instructing on malice? That, says Appellee, is a factual matter

---

1/ Appellee cites several cases at page 12, footnote 15 of its brief which are said to stand for the proposition that it is not error to refuse to give a repetitious instruction. Appellant does not argue with the proposition. Cases, as those cited by Appellee, in which the requested instruction is refused because the subject has already been covered elsewhere are not on point. In the instant case the Court decided, at the request of the jury, to re-instruct on the crucial issue in the case but in so doing, neglected a major element and thereby mislead the jury.

for the jury under"appropriate instructions".(Appellee's brief, page 14). The short and simple answer is that the instructions were not "appropriate".

A recent case decided by the United States Court of Appeals for the Ninth Circuit illustrates the kind of confusion that can be created in the minds of jurors when proper instructions are not repeated. In Notaro v. U.S., 363 F.2d, 169(9th Cir.1966) the defendant was charged and convicted of selling marijuana in violation of 21 U.S.C. §176a. His sole defense was entrapment and the evidence on this point was sufficiently convincing to prompt the trial judge to remark, after the verdict was in, that if he were the trier of fact he would have found for the defendant.

As part of the instruction on entrapment, the jury was told that if it should find "beyond a reasonable doubt" that the defendant was ready and willing to commit such crimes and that the government did no more than offer the opportunity to do so, then the defendant is not entitled to the defense of entrapment. The very next words were as follows:

> "On the other hand, if the jury should find from the evidence in the case that the accused had no previous intent or purpose to commit any offense of the character here charged, and did so only because he was induced or persuaded by some agent of the Government, then the defense of entrapment is a good defense and a jury should acquit the defendant". 303 F.2d at 173.

Noting the absence of any words as to the burden of proof, defense counsel requested an additional charge reading:

> "In this regard, if the jury should have any reasonable doubt from the evidence in the case as to whether the defendant was the victim of an unlawful entrapment, the jury should acquit the accused". 363 F.2d at 173

This request was apparently overruled. See 363 F.2d 173 and 175 (headnote 9, 10).

The Court of Appeals reversed on the grounds that the paragraph as quoted seemed to imply that the burden of proof did not fall on the government, but on the contrary, that the defendant was required to cause the jury to positively find that he had in fact been entrapped rather than that there was reasonable doubt as to that issue. The trial court had already given the usual general instructions on the burden of proof. The Court concluded:

> "In reading our conclusion, we have been mindful of obligation (sic) to consider the instructions in their entirety. The jury was properly informed, in a general instruction, as to the burden of proof which rested upon the prosecution; however, we cannot assume that it carried the advice of the general instruction into application of the instruction emphasizing the specific elements of the defense, the possibility that there was confusion or misunderstanding is strengthened, not eliminated, by view of the instruction as a whole".

In the instant case the crucial issue was malice (the difference between second degree murder and manslaughter), rather than entrapment. The only basis on

which Appellant could eliminate malice was to show that he acted out of self-defense. Appellee finds the giving of the two instructions (on malice and self-defense) "necessary and appropriate" for that reason. Moreover, the issue as a factual matter was certainly rather close and there was sufficient evidence, if believed, to raise a reasonable doubt. If a jury, as in Notaro, supra, could be mislead by the failure to repeat a correct instruction, or the substance of it, which had been given a moment before and also given as a general proposition, then how much more must have been the confusion here when the initial instruction and the fatally incomplete repeated instruction were separated by twenty-four hours. Bollenbach v. U.S., 326 U.S. 607 (1945). Appellant submits that under the circumstances the jury could not have given proper weight to the evidence on which it could have found that Appellant did not act with malice.

Contrary to Appellee's assertion, at page 11 of its brief, Appellant does not overlook the fact that the trial court had mentioned to the jury, as it was required to do, that fear may produce the heat of passion necessary to reduce murder to manslaughter. (See Appellant's brief, page 11). But the pronunciation of the word "fear" is not, as Appellee admits, enough. The full instruction on self-defense was needed to complete the picture, but on re-instruction the picture was incomplete.

Nor does Appellant argue as Appellee appears to think (Appellee's brief, pages 12-13) that Appellant claims reversible error for the trial court's failure to instruct the jury, sua sponte, on the factual elements of self-defense. On the latter point, however, Appellant strongly feels that if such a prayer had been requested it should have been granted. Without a request, the lack of such an instruction does not appear to be plain error.

What is important about the absence of a factual description of the elements of self-defense especially as related to malice, is that without it the jury was left with a bare bones instruction which, though not improper originally, was misleading and, therefore, erroneous on re-instruction. At the very least Appellant was entitled, to a re-instruction as he requested, in the form already given on self-defense or, better, the addition of some factual detail showing how self-defense and malice are interrelated in the context of the facts of the case. Again Appellant does not claim that the failure to put meat on the bare bones, without a request, was plain error. However, if the court had done so originally, the jury would have had a vastly improved concept of the relation between self-defense and malice and the need for re-instruction on self-defense thereby reduced.

II. THE EVENTS AT SIXTH AND ACKER STREETS

In responding to the issue raised by Appellant with regard to the alleged assault, Appellee fails to come to grips with the key problem. Despite the rhetoric and hyperbole (see Appellee's brief, page 15), Appellee cannot escape the fact that admission of other crimes in criminal cases is subject to greater scrutiny than other acts of a defendant. E.g. Fairbanks v. U.S., 96 U.S. App. D.C. 345, 226 F.2d 251(1955). This scrutiny takes the form of a process of balancing the relevance of the evidence against the danger of prejudicing the jury against the defendant by introducing crimes with which he is not charged. Harper v. U.S. 99 U.S. App. D.C. 324, 239 F.2d 945(1956).

In the instant case, the Appellant was convicted of second degree murder with aid of testimony that he later assaulted the deceased in another place. The alleged assault, if relevant at all, was introduced to show that Appellant acted with malice earlier when the fatal blow was struck. On the other hand, the testimony had the effect of making out the Appellant to be a generally dangerous type who ought to be put away, and the fact that, if the jury believed the Government, Appellant would not even let his victim die in peace or obtain medical aid was capable of further inflaming the jury. 1/

1/ The prosecutor was apparently not unaware of this possibility (Tr. 180-181)

Thus, the testimony must be, and should have been, subjected to the balancing process which this Court rightly requires in such cases. Harper v. U.S. supra, Burge v. U.S., 26 App. D.C. 524 (1906)

If distance and time from the act charged are relevant, then the instant case falls squarely between the two cases closed in factual detail, Burge v. U.S., supra (finding for the accused) and Copeland v. U.S., 80 U.S. App. D.C. 308, 152 F.2d 769(1945) (finding against the accused). Appellant submits that the better view in serious cases is to protect the accused where doubt may exist as to the possibility of prejudice. Corley v. U.S., ____ U.S. App. D.C.____, 365 F.2d 884 (1966).

Even if the court should find the evidence both relevant and admissible, Appellant should at the very least be entitled to a trial at which the evidence is introduced with an admonition from the court that it is relevant only to show Appellant's state of mind at the time of the fatal wounding, if the jury finds the evidence probative and that the jury should not draw any other conclusions from the evidence, particularly not with regard to Appellant's character or criminal disposition. E.g. Harper v. U.S., 99 U.S. App. D.C. 324 326, 239 F.2d.945, 947(1956).

The Appellee correctly points out that as the evidence was not objected to at trial, Appellant must satisfy the requirements of Rule 52(b), Fed. Rules

Crim. Proc., in order to obtain a reversal. This Court has invoked Rule 52(b) on numerous occasions and no list of citations is needed to demonstrate the point. The crucial issue is whether this case meets the test. The answer lies in part with the seriousness of the case (and murder in the second degree would certainly qualify as serious) and the gravity of the error. See Tatum v. U.S., 88 U.S.App.D.C.286, 190 F. 2d 612(1951). The merits of the point have been briefed and need not be repeated. If the Court finds error, there can be no doubt that since the error bore as heavily as it did on the central issue in this case, Appellant's substantial rights were affected.

III. THE CLOSING REMARKS OF GOVERNMENT COUNSEL

In answer to the third point raised by Appellant,[1/] Appellee relies heavily on Cross v. U.S. 122 U.S. App. D.C.283, 353 F.2d 454(1965). In Cross the evidence against the accused was "strong" on all points and the misstatement by the prosecutor, although serious, was corrected in the closing argument of defense counsel.

In the instant case the evidence as to malice was, at best, contradictory and, without the incident at Sixty and Acker Streets -- the very incident which was the subject of the statement complained of -- almost non-existent. The erroneous remarks of the prosecutor were uncorrected. The misstatement is no less serious than that in Corley v. U.S. supra and the evidence on the principally disputed issue no stronger.

1/ Appellant will not respond to the first paragraph of Appellee's third section (page 18) other than to say that it does not belong in a brief or any other pleading before this or any other court.

CONCLUSION

As Appellant pointed out in his conluusion to his initial brief, the effect of the errors committed at the trial had a cumulative effect. Put very succinctly, the trial court admitted irrelevant and inflamatory evidence which was given added, but inaccurate, color by the prosecutor and which bore on the crucial issue in the case (malice) as to which the court gave a defective and misleading re-instruction.

It is respectfully submitted that only by a remand and new trial can substantial justice be done.

Respectfully submitted,

Joel H. Fisher

Neal E. Krucoff
Counsel for Appellant
(Appointed by this Court)
1522 K Street, N.W.
Washington, D.C. 20005
Telephone 223-4600

Of Counsel:

FISHER, SHARLITT & GELBAND
1522 K Street, N.W.
Washington, D.C. 20005

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,421

JOSEPH W. BELL, III, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Cr. No. 234-66

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1) Did the trial court abuse its discretion (a) in declining to give a second instruction on self-defense, where appellant sought only a repeated instruction; and (b) in not incorporating a second self-defense instruction and factual discussion within its definition of malice, where the jury had been properly charged on both malice and self-defense separately, and had the clear alternatives before it?

2) Did the trial court commit plain error in failing to exclude evidence of the entire altercation, where such evidence was clearly an integral and essential part of the crime, and was highly relevant on the contested issue of malice?

3) Did plain error lurk in the summation of the prosecutor, who accurately adhered to the evidence?

INDEX

	Page
Counterstatement of the Case	1
The Government's Case	1
The Defense	5
Closing Matters	7
Statutes Involved	8
Summary of Argument	9
Argument:	
I. The court did not abuse its discretion in declining either to give a second instruction on self-defense or to elaborate the factual basis of the malice and self-defense issues at trial	10
II. The trial court did not commit plain error in admitting evidence showing the entire altercation between appellant and the decedent	14
III. There was no misstatement by the prosecutor; if so, it was not plain error	18
Conclusion	20

TABLE OF CASES

• *Burcham* v. *United States*, 82 U.S. App. D.C. 284, 163 F.2d 761 (1947)	16
Burge v. *United States*, 26 App. D.C. 524 (1906)	16
Carey v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961)	12
• *Copeland* v. *United States*, 80 U.S. App. D.C. 308, 152 F.2d 769 (1945), *cert. denied*, 328 U.S. 841 (1946)	16, 17
• *Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965)	20
Estes v. *United States*, 335 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965)	12
Falls v. *United States*, 116 U.S. App. D.C. 149, 321 F.2d 762 (1963)	12
Fryer v. *United States*, 93 U.S. App. D.C. 34, 207 F.2d 134, *cert. denied*, 346 U.S. 885 (1953)	11
Fulton v. *United States*, 45 App. D.C. 27 (1916)	12
Grant v. *United States*, 28 App. D.C. 169 (1906)	11
• *Harper* v. *United States*, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956)	16, 17
Jackson v. *United States*, 48 App. D.C. 272 (1919)	11
Jones v. *United States*, — U.S. App. D.C. —, 361 F.2d 537 (1966)	13
Josey v. *United States*, 77 U.S. App. D.C. 321, 135 F.2d 809 (1943)	11, 12

• Cases chiefly relied upon are marked by asterisks.

Cases—Continued

	Page
Karikas v. *United States*, 111 U.S. App. D.C. 312, 296 F.2d 434 (1961)	18
Kelly v. *United States*, — U.S. App. D.C. —, 361 F.2d 61 (1966)	14
Kenion v. *Gill*, 81 U.S. App. D.C. 96, 155 F.2d 176 (1946)	13
* *Kinard* v. *United States*, 68 App. D.C. 250, 96 F.2d 522 (1938)	14
Lewis v. *United States*, 295 Fed. 441 (1st Cir. 1924)	13
McAffee v. *United States*, 70 U.S. App. D.C. 142, 105 F.2d 21 (1939)	11, 12
Meadows v. *United States*, 65 App. D.C. 275, 82 F.2d 881 (1936)	12
* *Obery* v. *United States*, 95 U.S. App. D.C. 28, 217 F.2d 860 (1954), *cert. denied*, 349 U.S. 923 (1955)	13
Pitts v. *United States*, 99 U.S. App. D.C. 63, 237 F.2d 217 (1956)	14
Pritchett v. *United States*, 87 U.S. App. D.C. 374, 185 F.2d 438 (1950), *cert. denied*, 341 U.S. 905 (1951)	20
Rivera v. *United States*, — U.S. App. D.C. —, 361 F.2d 553, *cert. denied*, — U.S. — (Nov. 7, 1966)	14
Roberts v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, *cert. denied*, 368 U.S. 863 (1960)	12
Shreve v. *United States*, 103 F.2d 796 (9th Cir. 1939)	17
* *Stevenson* v. *United States*, 162 U.S. 313 (1896)	13, 14
Swann v. *United States*, 195 F.2d 689 (4th Cir. 1952)	17
Trice v. *United States*, 211 F.2d 513 (9th Cir. 1954)	17
United States v. *Allegretti*, 340 F.2d 254 (7th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965)	12
* *United States* v. *Bayer*, 331 U.S. 532 (1947)	13
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)	18
Villaroman v. *United States*, 87 U.S. App. D.C. 240, 184 F.2d 261 (1950)	14
Wallace v. *United States*, 162 U.S. 466 (1896)	14
Wheeler v. *United States*, 82 U.S. App. D.C. 363, 165 F.2d 225 (1947), *cert. denied*, 333 U.S. 829 (1948)	12

OTHER REFERENCES

22 D.C. Code § 2401	1
22 D.C. Code § 2403	1
1 Wigmore on Evidence §§ 216, 218 (3rd Ed. 1940)	16
2 Wigmore on Evidence §§ 363, 396 (3rd Ed. 1940)	16, 17
F.R. Cr. P. 30	14
F.R. Cr. P. 52(a)	12

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,421

JOSEPH W. BELL, III, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for murder in the first degree (22 D.C. Code § 2401). After a three-day trial before Judge Leonard P. Walsh and a jury, he was convicted of murder in the second degree (22 D.C. Code § 2403). Appellant was sentenced to imprisonment for seven to twenty-one years. This appeal without prepayment of costs followed.

THE GOVERNMENT'S CASE

In opening statement, the prosecutor outlined the evidence to be adduced for the Government. This he stated would show that appellant stabbed the decedent, Junius O. Truman, in a fight on the first floor of a house at 229 E Street, N.E., on December 25, 1965. It would also show that, while Mr. Truman was being helped from the scene of the stabbing to Casualty Hospital, appellant overtook Mr. Truman and beat him with a piece of wood taken from

a bannister at the 229 E Street address. (Tr. 22-23.) After the defense reserved its opening statement, the prosecutor announced stipulations to the effect that the decedent had been pronounced dead on December 25, and the body had been identified by two persons to a Deputy Coroner as that of Mr. Truman (Tr. 24-25).

The first witness was the Deputy Coroner, Dr. Marion Mann. Dr. Mann testified that he performed an autopsy on Mr. Truman's body on December 26 and determined the cause of death to be a stab wound of the chest and lung. This wound, about three or four inches deep, caused massive internal bleeding and filled the right lung with about a quart and a half of blood. There were also two superficial lacerations on the decedent's head. (Tr. 28.) Mr. Truman, the Deputy Coroner said, was a man of five feet ten inches in height and 115 pounds in weight, and appeared to be of his stated age of about fifty years (Tr. 28-29). His blood contained .1% of alcohol (Tr. 29).

Paul E. Hawes of 229 E Street, who had known appellant for ten years and Mr. Truman for three, next testified that at about 12:30 or 1 a.m. on the morning of December 25 he with several others was in appellant's room on the second floor of that address (Tr. 31, 34, 38, 41). Appellant entered the room briefly and left it again (Tr. 33-35). The witness could not see what he did in the room (Tr. 34). After appellant went out, Mr. Hawes heard a noise from the hall by the steps, and went out himself to see what was happening (Tr. 33-35, 40-41). He saw appellant with a knife and Mr. Truman with a screwdriver clenched in a fight in the first floor hallway (Tr. 33, 35, 41). Although he saw no blow, Mr. Truman was bleeding (Tr. 35). Mr. Hawes pulled the two men apart, disarmed appellant, and threw the knife on the floor. With Mr. Truman, he started off barefoot for Casualty Hospital. At 6th Street appellant and others came running from behind and caught up with them. (Tr. 36-37.) There was some hollering but Mr. Hawes did not see anything happen between appellant and Mr. Truman because he had left Mr. Truman momentarily to try to get into a store there. Someone cried out not to

start it up again. (Tr. 37.) Mr. Hawes had blood on his shirt and appellant asked him if he had been cut (Tr. 36-37, 42). Mr. Hawes' wife brought him his shoes and he continued on with Mr. Truman to the hospital (Tr. 37).

Bernard Sanders, a sixteen year-old, testified that he was awakened from sleep in his first floor bedroom by the sound of argument (Tr. 44-45). Appellant, complaining that he had been stabbed with a screwdriver, then went upstairs. After a minute or two, appellant came back downstairs and appellant and Mr. Truman started struggling. (Tr. 46.) The boy called for his brother-in-law, Paul Hawes, who separated the two men, took the bleeding Mr. Truman out of the house and started for the hospital (Tr. 47). Appellant went out after them, and the boy followed him (Tr. 47-48). In the vicinity of 6th and Acker Streets the boy saw appellant strike Mr. Truman with a stick. The decedent begged appellant not to strike again (Tr. 49). In the courtroom the witness identified as the same or similar to the stick used an exhibit which he saw recovered by the police and which was later introduced in evidence (Tr. 49-50, 78). The boy also confirmed that Mr. Hawes at 6th and Acker Streets had tried to get into a store, the door of which proved to be locked (Tr. 53).

Mary Ann Hawes, wife of Paul Hawes, described the fight in similar terms. She stated that appellant and Mr. Truman were "wrestling" downstairs, that her husband was called down, and with appellant's wife he separated the fighters (Tr. 55-56). After Mr. Hawes started for the hospital she followed carrying his shoes (Tr. 58). Approaching 6th Street about a block away she saw what she thought was appellant with a stick in his hand, although she no longer saw the stick when she got up to appellant and the others (Tr. 62-64).[1] There she heard Mr. Truman say, "Don't let him bother me anymore" (Tr. 59).

---

[1] The witness on examination by the prosecutor first stated that she from a block away saw appellant at 6th Street with a stick in his hand (Tr. 62). On questioning by the defense attorney she indicated that it might not have been appellant, but she did see somebody with a stick in his hand. Again in response to the prose-

Tuwana V. Sanders, also of 229 E Street, testified that she was in appellant's room with the others when appellant entered wordlessly and obtained something from a drawer (Tr. 66-67). She did not see what it was, however (Tr. 69). Thereafter, there was fighting between appellant and Mr. Truman downstairs, and Mr. Hawes took the latter out the back (Tr. 67-68). She did not see blood on appellant when he came upstairs, but did when he returned from 6th Street (Tr. 70).

Detective Leo E. Spencer, Homicide Squad, testified that he saw appellant about 1:55 a.m. as appellant was departing from 229 E Street (Tr. 72). Appellant at that time was putting on and buttoning a clean shirt, and there was no blood to be seen on him (Tr. 72, 77). Appellant pulled up his shirt and showed the officer a small brush-type abrasion on his chest, which had not broken the skin (Tr. 73-74). Appellant received no medical aid (Tr. 73). Although appellant stated that he had been in a fight with Mr. Truman, he denied stabbing Mr. Truman and did not then indicate that he had been at 6th and Acker Streets (Tr. 73, 77). The officer arrested appellant shortly thereafter, and some while after that recovered a broken [2] bannister post from the vicinity of 6th and Acker Streets (Tr. 74-75). The officer identified a photograph of the hallway of 229 E Street which showed matching bannister posts with several missing and also showed fresh wood splinters; the post and photograph were introduced in evidence (Tr. 76-87).[3] Thereupon, the Government rested.

---

cutor, she stated that there were only a few persons there, and it "looked like" appellant with the stick. (Tr. 63.) Appellant was there. In answer to the court, the witness stated that upon coming up to the scene she did not see the stick, although she had seen it before. (Tr. 64.)

[2] The clerk's sheet listing exhibits, a part of the record in this case, indicates that this post had been broken into two pieces.

[3] The jury during its deliberations called for the exhibits and was furnished them for examination.

The Defense

Appellant moved for judgment of acquittal on the first degree murder charge on the ground that insufficient time was shown for premeditation and deliberation (Tr. 79). The court denied the motion (Tr. 80).

Without opening statement, the defense proceeded. Linda Bell, wife of appellant, first took the stand for the defense. She testified that appellant had gone downstairs to get some glasses and then come back upstairs into his room before the fight (Tr. 83, 85). She did not see him go in a drawer (Tr. 85). Thereafter she heard someone holler that Mr. Truman had stabbed appellant and heard but did not see what sounded like a fight on the steps; she ran out, and saw the two men clenched together in the first floor hall at the bottom of the stairs (Tr. 82, 84, 86). In trying to separate them Mrs. Bell was knocked down and someone carried her upstairs (Tr. 82-83). She saw Mr. Truman stab at appellant but, she said, did not realize appellant "really" had been stabbed until he returned from going out (Tr. 89-90). She claimed that appellant then told her to call the police, which she said she did (Tr. 91, 98). And it was then that appellant changed his bloody clothes (Tr. 92). Mrs. Bell admitted that she had packed her belongings and her husband's bloody clothes to leave for her mother's house (Tr. 91-92).

Appellant himself next took the stand. He was twenty years of age and had lived at 229 E Street for three months (Tr. 106-107). Mr. Truman also lived there (Tr. 107-108). On the fatal night appellant was giving a Christmas Eve party and had gone downstairs to get some glasses when he met Mr. Truman who was coming in the front door (Tr. 108-109). Appellant had been drinking, but not a large amount (Tr. 112). He got into an argument with Mr. Truman over the landlady's turkey which, he said, Mr. Truman was trying to take away (Tr. 108-109). When appellant told Mr. Truman not to do so, Mr. Truman attacked him with a screwdriver and, he claimed, chased him up the stairs, stabbing him several times on the way

in the back, buttocks, and arm (Tr. 109, 117-118). Appellant said he did not enter his room, but only reached into a dresser drawer there to get a knife, all the while trying to push Mr. Truman away (Tr. 109-110, 118-120). "I didn't know what I had in my hand until I turned around as yet," he stated (Tr. 120). The two then clenched stabbing at one another and fell down the steps, said appellant, and it was probably after they fell down the steps that Mr. Truman was stabbed (Tr. 120-121). Then the fight was broken up (Tr. 122). When Mr. Truman left for the hospital appellant saw no blood on him (Tr. 122-123). Appellant admitted going to 6th and Acker Streets but only to see if Mr. Hawes was hurt (Tr. 115, 123). He denied striking Mr. Truman with the bannister post; but he saw Mr. Truman bleeding at 6th and Acker, although it was only appellant's own blood that was on appellant's shirt (Tr. 115, 123-124). Appellant said he asked the police when he was arrested for medical treatment, but he was given none until he arrived at the jail (Tr. 111, 125-127). He did not continue on from 6th and Acker to the hospital because he decided to return to the house to change his shirt and find out if everyone was all right (Tr. 130). Appellant was impeached without objection with a conviction for assault in 1964, which he admitted. He claimed that he did not know what happened to the knife after it was taken from him. (Tr. 134.)

Margaret E. Pollack, a nurse from the D.C. Jail, was called by the defense. She testified from medical records that appellant had received treatment on December 25 for "two small superficial area stab wounds" on the abdomen, and that a small healed scar was observed on the left buttock (Tr. 136-137). No other wounds were noted, and the only treatment appellant received subsequently was for a sore throat (Tr. 138-139).

The final defense witness was Gaither Ware. He stated that he had left appellant's room to find him when he saw appellant and Mr. Truman argue and then start to fight in the first floor hallway (Tr. 141, 152). So far as he saw, the entire struggle took place on the first floor (Tr. 159).

This witness even denied that appellant went upstairs to get a knife (Tr. 158). Although not questioned concerning the events at 6th and Acker Streets, Mr. Ware appeared to indicate that after the hallway fight he and appellant remained in appellant's room until Mrs. Bell went out to call the police (Tr. 142-145). Mr. Ware was impeached with a prior assault conviction (Tr. 159). Thereupon, the defense rested.

Closing Matters

Following brief testimony of two police detectives in rebuttal to appellant's claims concerning his wounds (Tr. 159-172), the prosecutor gave his closing argument. The prosecutor emphasized to the jury that everyone but appellant and his wife put the fight on the first floor, even defense witness Ware (Tr. 179-180). The prosecutor noted that appellant had chased several blocks after the decedent and had tried to beat him again (Tr. 180-181). He pointed out that one Government witness testified that appellant had actually struck Mr. Truman at 6th and Acker Streets with the bannister post introduced in evidence (Tr. 180).

The defense attorney in closing argued that this was a case of accident in the course of self-defense, or at least it lacked premeditation and deliberation (Tr. 186, 190-191). He pointed up appellant's testimony that the decedent followed appellant up the stairs and, in defending himself, appellant got a knife and the two tumbled down the stairs (Tr. 186-188). The defense attorney made only a single brief reference to the attack with the bannister post, claiming that Mrs. Hawes was indefinite about seeing appellant with the post (Tr. 192-193).

The court fully charged the jury on the elements of first and second degree murder, manslaughter, and assault with a deadly weapon (Tr. 209-221). Particular attention was given to the definition of, and the effect of, the presence or absence of malice (Tr. 211-213, 217-218, 219-220). The court fully instructed on the law of self defense (Tr. 221-225). Appellant suggested no instructions and expressed satisfaction with those given. The jury was excused at 4:17 p.m. to begin deliberations at 10 a.m. the next day. (Tr. 226.)

At 2 p.m. the next day court reconvened after receiving a note from the jury requesting reinstruction upon the elements of the four crimes involved and the meaning of deliberate and premeditated malice in connection with first degree murder. Appellant objected preliminarily to recharging of the jury. (Tr. 230.) The court, directing the jury to consider the instructions in the case as a whole and not to consider the court as placing particular emphasis on any aspect of the charge, proceeded to reinstruct the jury on the elements of the crimes in language substantially similar to that used earlier (Tr. 231-243). At completion of the recharging, appellant requested the court to reinstruct on self-defense also. Noting that the jury had not requested this, the court denied appellant's request. (Tr. 243.) The jury retired at 2:40 p.m. and returned its verdict at 4:30 p.m. (Tr. 243-244).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 502, provides:

> Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

Title 22, District of Columbia Code, Section 2401, provides:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 22, District of Columbia Code, Section 2405, provides:

> Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

SUMMARY OF ARGUMENT

I

On the basis of a request from the jury for reinstruction as to the elements of the offenses and the meaning of malice in first degree murder, the court recharged the jury in language substantially similar to that in the original charge on the elements of the four offenses involved. At the conclusion of the recharging, appellant requested a repeated self-defense instruction. The court declined to give this, noting that the jury had not asked for it. No error is specified in the instructions or reinstructions as given, so far as they go.

Under such circumstances, the court did not abuse its discretion in declining to give a second instruction on the law of self-defense merely to reemphasize that defense. Appellant's newly urged ground, that the definition of malice was reversibly erroneous unless it went so far as to incorporate within it an instruction on self-defense and a factual discussion, is faulty. While similar facts may support acquittal on self-defense or reduction in degree of homicide for lack of malice, the legal principles are distinct. The court had correctly instructed on both legal principles, so that the jury had the alternatives available, and the court was not obliged to argue appellant's facts for him.

II

Though unobjected to at trial, appellant here seeks to exclude all evidence of that portion of the altercation following the moment when the decedent received his eventually fatal blow. But this evidence told the full story of the murder and bared appellant's malice. It was an essential and integral part of the crime. And it bore great probative relevance on the only substantial issue in the case, that of appellant's malintent. Its admission was proper under either ground.

III

Appellant for the first time asserts that the prosecutor's summation misstated the evidence in reference to the chase and beating of the decedent. Examination of the record shows that the prosecutor spoke fairly and accurately. There was no error, much less plain error.

ARGUMENT

I. The court did not abuse its discretion in declining either to give a second instruction on self-defense or to elaborate the factual basis of the malice and self-defense issues at trial.

(Tr. 209-215, 217-226, 231-236, 238-243)

Appellant's initial predicate for reversal is that the trial court failed to renew its self-defense charge [4] to the jury after the jury had requested reinstruction on the elements of the offenses and on the deliberate and premeditated malice necessary for a first degree murder verdict.[5] This com-

---

[4] Appellant's Br. 9.

[5] The note from the jury stated in pertinent part:

"Please reinstruct the jury on the salient points which must be present for a verdict to be:

1. First degree murder
2. Second degree murder
3. Manslaughter
4. Assault with a dangerous weapon

plaint seems more significant for what it ignores than what it presents. Appellant concedes,[6] or at least does not challenge, the correctness of the self-defense instruction given.[7] Appellant does not claim specific error in the instructions as to what may distinguish first from second degree murder and second degree murder from manslaughter,[8] nor does he argue with the correctness of the definition of malice[9] so far as it goes or with the "heat of passion" instruction.[10] Appellant surprisingly overlooks[11] the significance of the trial court's direct reference to the effect of possible fear on the element of malice.[12] And appellant chooses to ignore the fact that the jury, having well relearned the meaning

---

Particular attention should be directed to the meaning of 'premedited [*sic*] and deliberate malice' in connection with the First Degree Murder verdict."

Appellant's version, apparently taken from the transcript, is inaccurate in minor respects. Br. 9.

[6] See Appellant's Br. 11.

[7] The instruction appears at Tr. 221-225. The defense is also mentioned briefly at Tr. 214-215. See *Josey* v. *United States*, 77 U.S. App. D.C. 321, 135 F.2d 809 (1943), and cases there cited. Appellant expressed satisfaction with this instruction (Tr. 226).

[8] These instructions appear in connection with the charges of first degree murder (Tr. 209-215; recharge, Tr. 231-236), second degree murder (Tr. 217-218; recharge, Tr. 238-240), manslaughter (Tr. 218-220; recharge, Tr. 240-242), and assault with a dangerous weapon Tr. 220-221; recharge, Tr. 242-243).

[9] Definitions of malice appear in the charges for the appropriate offenses. See footnote 8, *supra*. See *Fryer* v. *United States*, 93 U.S. App. D.C. 34, 38 n.18, 207 F.2d 134, 138 n.18, *cert. denied*, 346 U.S. 885 (1953); *McAffee* v. *United States*, 70 U.S. App. D.C. 142, 153-154, 105 F.2d 21, 32-33 (1939).

[10] This appears in connection with the manslaughter instruction. See footnote 8, *supra*. See *Jackson v. United States*, 48 App. D.C. 272, 277-279 (1919); *Grant* v. *United States*, 28 App. D.C. 169, 175-176 (1906).

[11] See Appellant's Br. 11.

[12] These references appear at Tr. 219-220, 240-241. Needless to say, the court's instructions in this regard, though brief, go far to answer appellant's entire first argument.

of deliberate and premeditated malice, gave appellant an acquittal on the first degree charge.

Appellant appears to argue that the reinstruction on the lesser included offenses was somehow fatally deficient, not because the court did not properly relate the elements of those offenses, but because the court did not renew or re-emphasize appellant's defense of self-defense. But the jury had received a proper self-defense instruction [13] and had indicated no need for further instruction on that defense.[14] There was no suggestion by appellant at trial of any purpose in renewing the instruction on that defense other than to give him the boon of reemphasis (Tr. 243). Fashionable though it may be to discount on appeal the ability of juries to resolve the issues that the law entrusts to them, certainly the decision to recharge a jury which has already heard a correct charge still remains within the scope of the trial court's sound discretion.[15] No abuse or unfairness is shown here.[16] Appellant had one good charge on his theory of defense and he should not be able to set up error in not having a second.

But appellant goes further. Seeking to invoke F.R. Cr.

---

[13] See footnote 7, *supra*.

[14] See footnote 5, *supra*.

[15] See, *e.g.*, *Wheeler* v. *United States*, 82 U.S. App. D.C. 363, 366, 165 F.2d 225, 228 (1947), *cert. denied*, 333 U.S. 829 (1948) (substance of requested charges already given); *Josey* v. *United States*, *supra* (same); *McAffee* v. *United States*, *supra* at 153-154, 105 F.2d at 32-33 (jury already fairly advised); *United States* v. *Allegretti*, 340 F.2d 254, 259 (7th Cir. 1964), *cert. denied*, 381 U.S. 911 (1965) (not necessary to give repetitious instructions); *Estes* v. *United States*, 335 F.2d 609 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965) (failure to repeat instructions already given not error).

[16] There was no singling out of any evidence for undue prominence. Compare *Meadows* v. *United States*, 65 App. D.C. 275, 82 F.2d 881 (1936); *Fulton* v. *United States*, 45 App. D.C. 27 (1916). Of course, the effect of an instruction on a jury must be judged by considering the whole. See *Falls* v. *United States*, 116 U.S. App. D.C. 149, 321 F.2d 762 (1963); *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961); *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209, *cert. denied*, 368 U.S. 863 (1960).

P. 52(a) on the basis of his barren request for a repeated self-defense charge, appellant urges a new and untried ground.[17] The trial court, he now claims, misled the jury by not relating in "some factual detail"[18] how the facts underlying a possible argument of self-defense might also support a possible reduction in degree of the crime. Thus, as we read appellant's argument, in failing to incorporate within the definition of malice an explanation of self-defense, the instruction on malice for second degree murder is made out to be reversibly erroneous.

It is thus apparent that appellant wants the trial court to argue his facts for him. But "no party can require the court, in effect, to argue his case by giving rulings based on a part only of the evidence. . . ." See *Obery* v. *United States,* 95 U.S. App. D.C. 28, 29 n.2, 217 F.2d 860, 861 n.2 (1954), *cert. denied,* 349 U.S. 923 (1955), quoting *Lewis* v. *United States,* 295 Fed. 441, 447 (1st Cir. 1924). Having stated the proposition of law fully and correctly so that the jury may apply the law to the facts, the court has performed its function. *Obery* v. *United States, supra* at 29, 217 F.2d at 861; see *Kenion* v. *Gill,* 81 U.S. App. D.C. 96, 99, 155 F.2d 176, 179 (1946). Elaboration of the charge and discussion of the evidence are matters again of judicial discretion, and appellant may not complain on appeal if the trial court does no more than it did here. *United States* v. *Bayer,* 331 U.S. 532 (1947);[19] *Jones* v. *United States,* — U.S. App. D.C. —, 361 F.2d 537 (1966).

Unwarranted as is appellant's proposition to require that the charge on the element of malice incorporate a self-defense charge, it contains a kernel of validity which we do not ignore. There may of course in a case such as this exist a possible relation between facts tending to make out self-defense and facts tending to show absence of malice; similar or identical facts may support both results. *Steven-*

---

[17] See Appellant's Br. 11-12.

[18] Appellant's Br. 12.

[19] "Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." 331 U.S. at 536.

son v. *United States,* 162 U.S. 313, 322 (1896); *Wallace* v. *United States,* 162 U.S. 466, 477 (1896); *Kinard* v. *United States,* 68 App. D.C. 250, 96 F.2d 522 (1938).[20] For this reason it was necessary and appropriate in the present case for the jury to be instructed both as to self-defense and malice. Whether the facts are found to create a perfect defense of self-defense, or an imperfect defense of absence of malice with reduction of the degree of homicide is naturally a jury question. *Stevenson* v. *United States, supra* at 315-316, 322-323; *Kinard* v. *United States, supra* at 253-254; *accord, Wallace* v. *United States, supra.* The fallacy of appellant's argument is that he treats a self-defense instruction as integral to a definition of malice where in fact it is the factual circumstances underlying the self-defense claim which may or may not be integral to a finding of malice or its absence. The matter is a factual determination for the jury under appropriate instructions, and was so here.

II. The trial court did not commit plain error in admitting evidence showing the entire altercation between appellant and the decedent.

Appellant now casts up a sweeping indictment of the trial below, although it seems perfectly clear from the silence of the trial attorney that appellate counsel stands alone in his judgment of its validity.[21] Because the fatal

---

[20] "Provocation sufficient to produce a heat of passion and a resulting absence of malice may give such character to a homicide as to make it manslaughter; the same provocation may, under slightly varied circumstances, justify a person in killing in self-defense." 68 App. D.C. at 254.

[21] Throughout the days of trial appellant never once objected to evidence or argument on the ground urged here. Evidence of guilt was convincing. Respect for the integrity of the judicial process and for the finality of the jury's verdict therefore compels rejection of appellant's claim for reversal. F.R. Cr. P. 30; *Kelly* v. *United States,* — U.S. App. D.C. —, 361 F.2d 61 (1966); *Pitts* v. *United States,* 99 U.S. App. D.C. 63, 237 F.2d 217 (1956); *Villaroman* v. *United States,* 87 U.S. App. D.C. 240, 241-242, 184 F.2d 261, 262-263 (1950); *cf. Rivera* v. *United States* — U.S. App. D.C. — 361 F.2d 553, *cert. denied,* — U.S. — (Nov. 7, 1966).

blow had already been struck, he complains, no evidence relating to this appellant's chase, interception, and renewed attack on his dying victim ought to have been admitted.[22] Torturing the meaning of the very cases relied upon, appellant attempts to cover this major segment of the evidence with his characterization as irrelevant, cumulative, confusing, inflammatory and prejudicial. Of course this evidence damaged appellant's case, but only because it told the full story of his crime and laid bare his malintent.

As set forth in the Counterstatement, the prosecutor referred to the knifing, the trip to the hospital, and the continued attack in his opening narrative to the jury of the matters to be proved. Of six witnesses in the Government's case-in-chief, all five who had participated described the events at 6th and Acker Streets as part of the action that night between appellant and decedent leading up to the latter's death. The sixth, the Deputy Coroner, described injuries on the decedent's head which subsequent testimony suggested had been inflicted there. Even the defense witnesses who had been there, except one, referred even if obliquely to those events in their direct examination. The evidence of which appellant here complains was treated by all concerned at trial as part and parcel of the fateful night's tale.

For fundamental reasons which appellant cannot underplay, the narrative in its entirety constituted proper evidence against appellant. This killing was not an isolated incident in a vacuum of circumstance where the trier might look at no more than an instant of action. The story of this murder was the story of a man knifed by his fellow roomer, aided from the scene by a good Samaritan who had disarmed his assailant, then followed and attacked with a wooden post nevertheless, and dying, finally, in the hospital with his lung filled with blood. Except near the scene of death and for brief moments before the chase, appellant was in wilful, violent, and continuous contact with his victim. "Appellant's conduct . . . cannot be

---

[22] Appellant's Br. 14-15.

broken down by him for evidentiary purposes to prevent the whole story of the affray from being told. That he staged a continuous performance during the few minutes which elapsed . . . is clearly apparent." *Burcham* v. *United States,* 82 U.S. App. D.C. 284, 163 F.2d 761 (1947). Also, 1 Wigmore on Evidence § 218 (3rd Ed. 1940) (res gestae, acts an inseparable part of whole deed admissible). Whether each individual act in this train of events by itself constitutes a separate crime within the single murderous transaction is not the issue.[23] Nor is the issue prejudice.[24] The issue is whether appellant may now deprive the trier of the integral and essential facts of the crime and thereby prevent trial from being a meaningful search for truth.

There is another more particular and equally fundamental reason for permitting this story to be told as it happened. In this case more than most the critical issue was the malintent of appellant in stabbing the decedent.[25] Where as here appellant admitted participating in argument, obtaining a knife, and struggling with the decedent, he placed his intent throughout this course of events sharply in issue. *Harper* v. *United States,* 99 U.S. App. D.C. 324, 326, 239 F.2d 945, 947 (1956); *Copeland* v. *United States,* 80 U.S. App. D.C. 308-309, 152 F.2d 769-770 (1945), *cert. denied,* 328 U.S. 841 (1946).[26] It was in fact the single

---

[23] See 1 Wigmore, *supra,* § 216 (criminality of conduct immaterial if conduct otherwise relevant).

[24] See 1 Wigmore, *supra,* § 218 at 719 (not subject to complaint by way of "undue prejudice" to character, nor by way of "unfair surprise").

[25] "[T]he intent to kill is in homicide practically always in issue, and is to be proved by the prosecution. . . . [T]herefore, the evidence [of similar acts negating innocent intent] is receivable irrespective of whether the act charged is conceded or not." 2 Wigmore, *supra,* § 363 at 275.

[26] *Burge* v. *United States,* 26 App. D.C. 524 (1906), upon which appellant places primary reliance, is distinguished by the Court in *Copeland* on the basis that *Burge* presented no genuine issue of intent. 80 U.S. App. D.C. at 309, 152 F.2d at 770. Appellant cannot escape that reading. See Appellant's Br. at 16-20. *Copeland* is

substantial question in the case. *Harper* v. *United States, supra.* Separated only by moments from the original knifing and fixed in the immediate surrounding circumstances of that act, the subsequent attack on the same victim cannot reasonably be excised from the trial for remoteness from intent. Subsequence here may affect weight but not admissibility. See *Copeland* v. *United States, supra;* 2 Wigmore, *supra,* §§ 363,[27] 396.[28] "Intent is a state of mind difficult of precise proof and, therefore, evidence of other and surrounding circumstances may be received for the purpose of proving such intent. Acts done and declarations made after the act of which the defendant is accused are admissible as bearing on intent.'[29] Highly relevant and probative on the critical issue, the present evidence does not suffer if balanced against any "undue prejudice." *Harper* v. *United States, supra.* "In a prosecution for homicide, 'the recurrence of other acts of the sort tends to negative inadvertence, defensive purpose, or any other form of innocent intent.'" *Copeland* v. *United States, supra* at 309, 152 F.2d at 770, quoting 2 Wigmore, *supra,*

---

undoubtedly representative of the preferred view. See 2 Wigmore, *supra,* § 363, and *infra.* For an even broader reading of *Copeland,* see *Swann* v. *United States,* 195 F.2d 689, 692 (4th Cir. 1952).

[27] "[The similar acts] need not have been done to the same person; they need not have accompanied more or less immediately the act charged, and they may have been done even at a subsequent time." § 363 at 275.

[28] "Where an emotion of hostility at a particular time is to be shown, the existence in the same person of the same emotion at another time is in general admissible. What that *limit of time* [original emphasis] should be must depend largely on the circumstances of each case, and ought always to be left to the discretion of the trial Court . . . ." § 396 at 349-350. "The use of *subsequent* emotion sometimes encounters a judicial doubt . . . . This may be due to the crude catchword, 'Presumptions reach forward, not backward' . . . . Where did this groundless formula arise?" § 396 at 349, n.1.

[29] *Trice* v. *United States,* 211 F.2d 513, 519, n.1. (9th Cir. 1954), quoting *Shreve* v. *United States,* 103 F.2d 796, 803 (9th Cir. 1939).

§ 363 at 275. Viewed under the law of reason and this jurisdiction the evidence complained of is unobjectionable.

III. There was no misstatement by the prosecutor; if so, it was not plain error.

(Tr. 28, 36-37, 47-49, 50, 53, 59, 62-64, 70, 74-75, 180-181, 183, 202-205)

Appellant's final claim [30] is based on a bald misconception of the evidence which perhaps illustrates the blindness of overzealous advocacy. The assertion is that the prosecutor's summation misstated the evidence.[31] An examination of the record shows otherwise.

The prosecutor referred to the testimony of a witness who testified to seeing appellant strike the decedent with a stick identified as Government exhibit No. 1. The prosecutor then argued that the evidence to the effect that appellant followed and beat the decedent should be considered in relation to the intent requirements of first and second degree murder.[32] The evidentiary basis for this line of

---

[30] Here once more it is appropriate to note the total absence of objection at trial which properly should preclude consideration of the matter here. See footnote 21, *supra*. See also, *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940); *Karikas* v. *United States*, 111 U.S. App. D.C. 312, 316, 296 F.2d 434, 438 (1961).

[31] Appellant's Br. 25.

[32] Although Appellant's Br. at 25, n.8 refers to a quotation on page 5 of his brief, we assume he means to refer to the portion of the summation he quotes at page 14. This in more complete form is as follows:

> Well, he [appellant] took the stand and he corroborated to some degree what the witnesses said, that he was at the scene of Sixth and Acre Place [*sic*]. One of the other witnesses went so far as to say not only was he there but he struck the deceased again with Government's Exhibit No. 1. Yes, he struck him again, ladies and gentlemen.
>
> If it isn't premeditation then have you ever had a better case of a mind bent on mischief, a mind fatally bent on mischief, if this isn't first degree? The reason I emphasize that,

argument had been set forth in full by the testimony. As indicated in the Counterstatement, almost every witness at trial testified in some respect to these events. Specifically, every Government witness except the police and the Deputy Coroner testified to the fact that appellant had left 229 E Street shortly after the decedent and Mr. Hawes;[33] Mr. Hawes testified that appellant and others "came running behind" him at 6th and Acker Streets;[34] Mrs. Hawes and Bernard Sanders testified that appellant was armed with a stick there and the decedent begged him not to strike again;[35] Mr. Sanders testified that he saw appellant strike the decedent with the stick;[36] Mr. Sanders and Detective Spencer testified to finding the bannister post identified as the weapon in the vicinity;[37] the post was broken in two;[38] and the decedent had two unexplained lacerations on his head when his body was autopsied.[39]

Appellant's complaint vanishes in the absence of any misstatement.[40] Even if the prosecutor's argument could

---

> if you have any doubt as to whether it is first degree, when you get your definition of a second degree murder then, ladies and gentlemen, you would say if they have not made first you certainly couldn't miss second, because here was a man chasing him two or three blocks trying to beat him, and the poor old man—I won't say "poor old man" because a man fifty years old isn't really old. He said, "Don't let him bother me." (Tr. 180-181.)

See also the prosecutor's later remarks (Tr. 202-203).

[33] Mr. Hawes (Tr. 36-37); Bernard Sanders (Tr. 47-48); Mrs. Hawes (Tr. 62-64); Tuwana Sanders (Tr. 70).

[34] Tr. 36-37.

[35] Mrs. Hawes (Tr. 59, 62-64); Mr. Sanders (Tr. 48-49).

[36] Tr. 48.

[37] Mr. Sanders (Tr. 50); Detective Spencer (Tr. 74-75).

[38] See footnote 3, *supra*.

[39] Tr. 28.

[40] In this context, appellant's attempt to rely upon the indefiniteness of certain portions of Mrs. Hawes' testimony and on Mr. Hawes' inability to corroborate the assault with the post seems hardly deserving of answer. See footnote 1, *supra*, concerning Mrs.

be characterized as appellant attempts to do, the instructions given,[41] the pettiness of any inaccuracy,[42] and the strength of the Government's case would militate against a finding of error, much less plain error. *Cross* v. *United States*, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Hawes; and see Counterstatement 2-3 and Tr. 37, 53, concerning Mr. Hawes. Compare Appellant's Br. 25-26.

To avoid confusion, we would note an apparent misconception in Appellant's Br. at 26 concerning Mrs. Hawes' testimony. She did not indicate that appellant was enroute toward 6th and Acker Streets when she thought she saw him with the stick, but that *she* was enroute and about a block away (Tr. 62-64). It is clear from her testimony that appellant was already there.

[41] The instructions properly advised the jury that arguments of counsel were not evidence and that the jury's recollection controlled (Tr. 203-205). The prosecutor also reminded the jury of that latter principle in closing (Tr. 183).

[42] Counsel should be given wide latitude in closing argument if their statements have some basis in fact. See *Pritchett* v. *United States*, 87 U.S. App. D.C. 374, 376, 185 F.2d 438, 440 (1950), *cert. denied*, 341 U.S. 905 (1951).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967—247-290/650